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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/567,927	02/10/2006	Choon Kooi Chai	4702-40	5373
23117 7590 08/05/2009 NIXON & VANDERHYE, PC 901 NORTH GLEBE ROAD, 11TH FLOOR ARLINGTON, VA 22203				
EXAMINER				
NUTTER, NATHAN M				
ART UNIT		PAPER NUMBER		
1796				
MAIL DATE		DELIVERY MODE		
08/05/2009		PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

# Office Action Summary

**Application No.**

10/567,927

**Applicant(s)**

CHAI, CHOON KOOI

**Examiner**

Nathan M. Nutter

**Art Unit**

1796

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 29 July 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 23-44 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 23-44 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-946)
- 3) ☐ Information Disclosure Statement(s) (PTO/SE/US)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

**DETAILED ACTION**

***Response to Amendment***

In response to the amendment filed 29 July 2009, the following is placed in effect.

Applicant's request for reconsideration of the finality of the rejection of the last Office action of 29 January 2009 is persuasive and, therefore, the finality of that action is withdrawn.

The amendment filed has been entered.

***Claim Rejections - 35 USC § 102/103***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) and the Intellectual Property and High Technology Technical Amendments Act of 2002 do not apply when the reference is a U.S. patent resulting directly or indirectly from an international application filed before November 29, 2000. Therefore, the prior art date of the reference is determined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 23-44 are rejected under 35 U.S.C. 102(e) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Farley et al (US 2003/0215659).

The reference to Farley et al teaches the manufacture of a polymer blend comprising a copolymer of ethylene with an alpha-olefin "having a density of from 0.916 to 0.928 g/cm<sup>3</sup>" and a melt index of from "about 0.05 to 15 dg/min.." Note the Abstract and paragraph [0008]. The polymer may have two or more melting peaks at Table IV, including "between 30° and 150°." The molecular weight distribution is shown at paragraph [0010]. The second polymer is taught as being a low density polyethylene which may be a homopolymer at paragraph [0025]. The compositional limitations are shown at the Abstract. The reference shows use as an extrusion coating. The use of metallocene catalysts to produce the component (a) is shown at the Abstract. The choice of catalyst, in this product-by-process format, is inconsequential since the claims are drawn to a composition.

The reference teaches the production of a polyethylene/alpha-olefin LDPE blend, as herein contemplated. While the reference does not show the elastic modulus of the ethylene/alpha-olefin copolymer or the flow activation energy, the limitations do not serve to define over the teachings of the reference as to composition or constituents

employed. As such, the elastic modulus and flow activation energy would be expected from the composition as taught, unless shown otherwise. Nothing is recited in the claims that indicate a difference as to composition. It has been held in SmithKline Beecham Corp. v. Apotex Corp., No. 04-1522 (Fed. Cir. February 24, 2006) that product-by-product claims are not claim limitations.

Once a reference teaching a product appearing to be substantially identical is made the basis of a rejection and the examiner presents evidence or reasoning tending to show inherency, the burden shifts to the applicant to show an unobvious difference. In re Fitzgerald, 619 F.2d 67, 70, 205 USPQ 594, 596 (CCPA 1980). In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433-34 (CCPA 1977). In re Schreiber, 128 F.3d 1473, 1478, 44 USPQ2d 1429, 1432 (Fed. Cir. 1997).

As such, the instant claims would be at least obvious, if not anticipated, by the teachings of Farley et al.

Claims 23-25, 28, 30 and 37-44 are rejected under 35 U.S.C. 102(e) as being anticipated by Ohlsson (US 2004/0053022).

The reference to Ohlsson teaches the manufacture of a polymer blend comprising a copolymer of ethylene with an alpha-olefin having "a density of from 0.910 to 0.940 g/cm<sup>3</sup>" and a melt index of from "0.1 to 15 g/10 min.." Note the Abstract and paragraph [0009]. The polymer may have two melting peaks at Table 2, including "between 30° and 150°." The molecular weight distribution is shown at paragraph [0009]. The second polymer is taught as

being a low density polyethylene which may be a homopolymer at paragraph [0173]. The compositional limitations are instantly envisaged. The reference shows use as an extrusion coating. Note paragraph [0190]. The use of metallocene catalysts to produce the component (a) is shown at paragraphs [0073]-[0153]. The choice of catalyst, in this product-by-process format, is inconsequential since the claims are drawn to a composition.

The reference teaches the production of a polyethylene/alpha-olefin LDPE blend, as herein contemplated. While the reference does not show the elastic modulus of the ethylene/alpha-olefin copolymer or the flow activation energy, the limitations do not serve to define over the teachings of the reference as to composition or constituents employed. As such, the elastic modulus and flow activation energy would be expected from the composition as taught, unless shown otherwise. Nothing is recited in the claims that indicate a difference as to composition. It has been held in SmithKline Beecham Corp. v. Apotex Corp., No. 04-1522 (Fed. Cir. February 24, 2006) that product-by-product claims are not claim limitations.

Once a reference teaching a product appearing to be substantially identical is made the basis of a rejection and the examiner presents evidence or reasoning tending to show inherency, the burden shifts to the applicant to show an unobvious difference. In re Fitzgerald, 619 F.2d 67, 70, 205 USPQ 594, 596 (CCPA 1980). In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433-34 (CCPA 1977). In re Schreiber, 128 F.3d 1473, 1478, 44 USPQ2d 1429, 1432 (Fed. Cir. 1997).

As such, the instant claims would be at least obvious, if not anticipated, by the teachings of Ohlsson.

### ***Response to Arguments***

Applicant's arguments filed 29 July 2009 have been fully considered but they are not persuasive.

With regard to the rejection of claims 23-44 under 35 U.S.C. 102(e) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Farley et al (US 2003/0215659), applicants point out the reference does not teach the elastic modulus. However, the compositions otherwise are identically disclosed, and the burden becomes that of applicants to show a patentable difference thereover. Further, applicants refer to paragraph [0144] stating the polymers of the reference are "without long chain branching." This is not accurate since that paragraph says "preferably linear polymers," and then teaches the same VLDPE to have a CDBI of 50 to 85% which would provide for branching. Applicants then support their assumption the published application only employs "linear" polymers stating the reference "discloses that the long chain branching of the polymers should be reduced...(by the use of bisCp metallocenes." It is pointed out to applicants that a reference is taken for the entirety of its teachings, and not for isolated examples or even preferred embodiments. This passage actually reinforces the concept the Farley et al polymer is branched, or there would be no need to reduce the branching. Applicants' characterization of the catalyst of

Farley et al is similarly skewed, and not accurate. Applicants then propose an assumption, without providing details, calculations or other reasoning that "(o)n analysis, a copolymer representative of component (a) of the present invention exhibits a melt flow ratio of 18." First, neither is this characteristic a part of any claim, but it fails to appear in the Specification, as originally filed. As such, the argument thereto is summarily dismissed as being based on matter not of patentable scope in the instant application. Further, applicants' reasoning as to the melt elastic modulus of the composition of Farley et al is neither clear nor well-founded. No calculations or other comparative evidence has been presented. Applicants' conclusion appears to be based upon speculation.

With regard to the rejection of claims 23-25, 28, 30 and 37-44 under 35 U.S.C. 102(e) as being anticipated by Ohlsson (US 2004/0053022), the comparison of melt flow ratios taught by the reference with the values measured from the copolymers claimed herein has simply not been shown. Applicants reasoning is based on conjecture, The parameter has no antecedent basis in either the claims or the Specification, as originally filed, and applicants provide no clear calculation as to how the values proffered were derived. No direct comparisons have been made. Nothing unexpected has been shown on the record.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).



A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Nathan M. Nutter whose telephone number is 571-272-1076. The examiner can normally be reached on 9:30 a.m.-6:00 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, James J. Seidleck can be reached on 571-272-1078. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Nathan M. Nutter/  
Primary Examiner, Art Unit 1796

nmn

1 August 2009